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SUPREME COURT
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October Term, 1972
No. 72-955

W. C. SPOMER, State's Attorney of
Alexander County, Illinois,

Petitioner,

v.

EZELL LITTLETON, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

BRIEF OF THE DISTRICT ATTORNEY OF THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA AS AMICUS CURIAE

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TABLE OF AUTHORITIES CITED

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W.C. SPOMER, State's Attorney of Alexander County, Illinois,

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EZELL LITTLETON, MANKER HARRIS, JAMES WILSON, CARL HAMPTON, HAZEL JAMES, WALTER GARRETT, CHARLES KOEN, FRANK WASHINGTON, CURTIS JOHNSON, CHERYL GARRETT, YVONDA TAYLOR, RUSSELL DEBERRY, ROBERT MARTIN, PRESTON EWING, JR., JAMES BROWN, HERMAN WHITFIELD, WALLACE WHITFIELD, LEROY LAMBERT, By His Father and Next Friend, HOBERT LAMBERT, MORRIS GARRETT, By His Father and Next Friend, LEVI GARRETT, Individually and as Representatives of a Class,

Respondents.

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BRIEF OF THE DISTRICT ATTORNEY OF THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA AS AMICUS CURIAE

This brief is filed with this Court pursuant to the authority found in paragraph 4 of Rule 42 of the Supreme Court Rules.

INTEREST OF THE AMICUS CURIAE

The United States Court of Appeals for the Seventh Circuit has announced in the instant case[1] the novel doctrine that where it is "alleged and proved . . . that state officials consistently, designedly and egregiously have, under color of law, deprived an entire group of citizens of their civil rights" (468 F.2d at 415), then a federal court, pursuant to 42 USC § 1983,[2] can grant injunctive relief which includes provision for continuing supervision of state court judges or prosecuting attorneys in order to prevent unconstitutional class discrimination in the enforcement of the criminal laws of the state. The court below, although eschewing the implication that the injunctive relief "require[s] the district court to sit in constant, day-to-day supervision of either state court judges or

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1. The case is reported as Littleton v. Berbling (1972) 468 F.2d 389.

2. 42 USC § 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

the State's attorney," provided the district court with "some guidelines as to what type of remedy might be imposed." (468 F.2d at 414.) The injunctive relief contemplated by the court below was indicated as follows:

> "An initial decree might set out the general tone of rights to be protected and require only periodic reports of various types of aggregate data on actions on bail and sentencing and dispositions of compliants. Nevertheless, we have complete confidence in the district court's ability to set up further guides as required[52] and if necessary to consider individual decisions.[53] Difficulty of formulating a remedy if a complaint is proved following a trial cannot be grounds for dismissing the complaint ab initio. We cannot so easily belittle the powers of a court of equity nor the ability of district judges who have grappled with difficult remedies before, e.g., school desegregation orders, railroad reorganizations." [Note] "52 E.g., Abrams, Internal Policy: Guiding the Exercise of Prosecutorial Discretion. 19 U.C.L.A. L. Rev. 1 (1971). [*]

[Note] 53 Id. at 45-49 discussing Regina v. Commissioner of Police ex rel. Blackburn. [1968] 1 Q.B. 118." (468 F.2d at 414-415.)

There can be no doubt that District Judge Dillin in his dissenting opinion was quite right in declaring that "[t]he majority holds, for the first time, that a federal district court has the power to supervise and to regulate by mandatory injunction the discretion which state court judges and state's attorneys may exercise within the limits of the powers vested in them by law." (468 F.2d at 415.) The expression of confidence by the court below "in the district court's ability to set up further guides as required and if necessary to consider individual decisions" (468 F.2d at 415) warrants petitioner W.C. Spomer's interpretation that the court below holds that "[t]he District Court can require, under pain of contempt, that the prosecutor bring a particular change and prosecute it in a manner the District Court regards as sufficiently competent." (Petition by W.C. Spomer, States Attorney of Alexander County, Illinois, at page 7.)[3/]

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3. Although we submit this brief generally in support of petitioner W.C. Spomer (No. 72-955) much of what we say is relevant to the contentions made by petitioners Michael O'Shea and Dorothy Spomer (No. 72-953) and petitioners Berbling and Shepherd (No. 72-1107). This Court has granted certiorari as to both No. 72-953 and No. 72-955.

A decision by this Court upholding the doctrine announced by the court below would have a profound impact upon the administration of criminal justice in state proceedings and would seriously dislocate federal-state relations in this sensitive area.

The District Attorney of Los Angeles County is responsible for the prosecution of felonies and many misdemeanors in the County of Los Angeles which has a population of over 7,000,000. With 450 prosecuting attorneys under his supervision, his office is the largest prosecuting agency in the United States. Like many counties or municipalities, the County of Los Angeles has a population comprising a multiplicity of racial, ethnic, religious or other groups based upon "suspect" classifications, such as race, national origin, alienage, indigency, or illegitimacy. (See concurring opinion by Stewart, J., San Antonio School District v. Rodriquez (1973)___U.S.___, 36 L.Ed.2d 16, 58, 93 S.Ct.1278.)

It is quite obvious, we feel, that a litigation with the view of obtaining the type of injunctive relief contemplated by the court below in the instant case would severely burden the administration of justice in both federal and state courts.

In view of the foregoing, we think it appropriate to communicate to this Court our views respecting the novel doctrine announced by the court below. We modestly think that the expression of our concern in this matter will be seen in the light of the fact that it is consistent with our determination that criminal justice in the County of Los Angeles will not be "applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, . . ." Yick Wo v. Hopkins (1886) 118 U.S. 356,373, 30 L.Ed. 220, 227, 6 S.Ct. 1064. An evidence of our determination to that end can be seen in the release on April 24, 1973, noticed in the national press, of a Rand Corporation report entitled PROSECUTION OF ADULT FELONY DEFENDANTS IN LOS ANGELES COUNTY: A POLICY PERSPECTIVE, Prepared for the Los Angeles County District Attorney's Office, with Support of the National Institute of Law enforcement and Criminal Justice, L.E.A.A., Department of Justice, R-1127-DOJ, March 1973, by Peter W. Greenwood, Sorrel Wildhorn, Eugene C. Poggio, Michael J. Strumwasser, and Peter De Leon. This report contains comparative statistical data

concerning racial and ethnic groups.[4/]

This report was prepared pursuant to our request and with our encouragement in order to

4. We include pages 56 through 59 of the report in Appendix A to this brief to show how, while acquittal and conviction rates, distribution of conviction levels, and distribution of sentence levels reflect "moderate to small (but statistically significant) disparities in the treatment of defendants by ethnic group in the courts" (Ibid.at 59), it cannot be concluded by such evidence alone that "state officials consistently, designedly and egregiously have, under color of law, deprived an entire group of citizens of their civil rights, . . ." ("Slipheet" opinion of court below, at p. 40.)

That is, a superficial pattern of discrimination can be established but such a pattern may lead to fallacious inferences without a thoroughgoing, in-depth, statistical study which removes various sociological aspects other than the classification in issue.

It is interesting to consider the Rand finding that "[t]he black acquittal rate is considerably higher than that of the Anglo-Americans and, to a somewhat lesser extent, higher than that of the Mexican-Americans" (Op. cit. at 56)in the light of this Court's observation in Greenwood v. Peacock (1966) 384 U.S. 808, 832, 16 L.Ed.2d 944, 959, 86 S.Ct. 1800, in disapproving the notion that a criminal case in a state court could be removable to a federal court upon a petition alleging that the defendant was being prosecuted because of his race, that "such removal petitions could, of course, be filed not only by Negroes, but also by members of the Caucasian or any other race." (384 U.S. at 832, 16 L.Ed.2d at 959 n. 31.)

ascertain, inter alia, what improvements could be made in the criminal justice system with respect to patterns of law enforcement which suggest that justice is not meted out even-handedly in the County of Los Angeles. With this concern in mind, we submit this brief in order that bona fide efforts by the Office of the District Attorney of the County of Los Angeles to improve law enforcement will not be impeded by unnecessary litigation in federal courts.

SUMMARY OF THE ARGUMENT

We are not concerned with the questions of injunctive relief pursuant to 42 USC § 1983 which have hitherto been considered by federal courts with respect to state court judges or state prosecuting attorneys. Thus, we are not concerned with injunctive relief requiring the performance of ministerial duties, or which would prohibit pending or threatened prosecutions. Rather, the instant case involves the development of a novel doctrine which would authorize an on-going supervision of state court judges or state prosecuting attorneys in order to prevent the non-enforcement of criminal laws as to real or purported victims and where such supervision would necessarily or probably require review of individual cases where prosecutions have not been undertaken at the requests of real or purported victims of crimes.

We argue that such equitable relief, in the form or nature of a mandatory injunction, would be inconsistent with those principles of federalism, comity, and equity which have been formulated and applied by this Court.

Moreover, we contend that the doctrine announced by the court below is inconsistent with the purposes underlying the doctrine that 42 USC § 1983 did not abolish the common-law immunities of state officials performing judicial or quasi-judicial duties.

We do not urge that 42 USC § 1983 forbids all injunctive relief with respect to the judicial or quasi-judicial acts of state officials to whom the common-law immunities apply. We do, however, contend that the supervision by way of mandatory injunction such as that contemplated by the court below of state officials performing judicial or quasi-judicial duties which involve discretion not to prosecute would so undermine the purposes of the common-law immunities that no reason could be discerned for maintaining such immunities even in damage suits under § 1983.

Furthermore, it would appear that under the constitutional separation of powers, there is no reason for believing (but every reason to the contrary) that federal judges should review the discretionary acts of federal

prosecuting officers by the type of supervision contemplated by the court below. Any doctrine that the Supremecy Clause overrides any constitutional separation of powers pertaining to the states cannot be without limitation in view of the nature of each branch of government. The reasons underlying separation of powers are based upon common-law ideas and prudential considerations which apply equally to the states. Such factors should cause this Court to be especially leary of permitting federal courts to embark on the supervision of state officials on a grand scale.

Even if the civil rights complaint herein would be deemed, in other circumstances, to be legally sufficient to state a claim under 42 USC § 1983, it does not follow that it is legally sufficient to state a claim for injunctive relief of the type contemplated by the court below. Moreover, the evidence which would justify such injunctive relief must necessarily be more compelling than that which would justify some lesser and more traditional type of equitable relief, such as a prohibitory injunction respecting actual or threatened prosecutions.

Finally, we contend, that even if equitable relief which would entail comprehensive supervision of state court judges or state prosecuting attorneys such as is contemplated by the court below can be proper in some cases, we urge

that such relief should only extend to those state officials who have intentionally and knowingly engaged in unconstitutional law enforcement rather than also to their colleagues or successors in office who are not alleged and found to have abused their positions.

ARGUMENT

I

WHILE 42 USC § 1983 AUTHORIZES INJUNCTIVE RELIEF FOR VIOLATIONS OF THE EQUAL PROTECTION CLAUSE, THE INJUNCTIVE RELIEF CONTEMPLATED BY THE COURT BELOW VIOLATES THE PRINCIPLES OF COMITY, FEDERALISM, AND EQUITY ESTABLISHED BY THIS COURT

Of course, it must be conceded that mere failure to prosecute other offenders is no basis for a finding that there has been a denial of equal protection of the laws. One must show an intentional or purposeful discrimination in order to show that unequal administration of a state statute offends the equal protection clause. The conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Statistics might imply a policy of selective

enforcement,[5] but a finding of a denial of equal protection is not supported unless the selection was deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification. See, generally, Yick Wo v. Hopkins (1886) 118 U.S. 356, 30 L.Ed. 220, 6 S.Ct. 1064; Snowden v. Hughes (1944) 321 U.S. 1, 88 L.Ed. 497, 64 S.Ct. 397; Oyler v. Boles (1962) 368 U.S. 448, 7 L.Ed.2d 446, 82 S.Ct. 501; Moss v. Hornig (2d Cir. 1963) 314 F.2d 89. We agree, of course, that "the sharp edge of the Supremacy Clause cuts across all such generalizations" such as that "[a] federal court is always reluctant to interfere with state criminal proceedings, because of statutory restraints and because of respect for the doctrine of comity." (United States v. McLeod (5th Cir.1967) 385 F.2d 734, 745; footnotes omitted.) But in considering whether 42 USC § 1983 authorizes a federal court to grant injunctive relief of a nature as set forth by the court below, we bear in

5. An in-depth statistical study may disclose that, once the effects of other sociological aspects are removed, a defendant's race becomes a neutral factor in the administration of criminal justice although some data may superficially suggest racial bi s. See, for example, A Study of the California Penalty Jury in First-Degree Murder Cases, 21 Stanford L.Rev. (Special Issue, June 1969) 1297, 1420-1421.

mind the words of Mr. Justice Douglas in his dissenting opinion in Pierson v. Ray, infra, 386 U.S. at 558, 565, 18 L.Ed.2d at 297, 301, that "[t]he question presented is not of constitutional dimension; it is solely a question of statutory interpretation."

There can be no doubt that in the light of the history of the ancestor of 42 USC § 1983,[6] as set forth in the opinions of this Court concerning it,[7] that it "is proper for a person adversely affected to bring an action under 42 USC § 1983 on the grounds that he has been denied his rights under the equal protection clause of the Constitution." (Shock v. Tester (8th Cir. 1969) 405 F.2d 852, 855.) Section 1983 provides for equitable relief as a remedy and this Court in Mitchum v. Foster, 407 U.S. 225, has held that this statute constitutes an "expressly authorized" exception to the federal anti-injunction statute (28 USC § 2283) which

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6. The statute is derived from § 1 of the Ku Klux Klan Act of 1871, Act of April 20, 1871, c 22, § 1, Stat 13.

7. See Monroe v. Pape (1960) 365 U.S. 167, 172-178, 5 L.Ed.2d 492, 497-500, 81 S.Ct. 473; Mitchum v. Foster (1972) 407 U.S. 225, 32 L.Ed.2d 705, 715-717, 92 S.Ct. 2151; District of Columbia v. Carter (1973) ___ U.S. ___, 34 L.Ed.2d 613, 621-623, 93 S.Ct. 602.

provides that a federal court "may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to promote or effectuate its judgments." But this Court has just recently re-affirmed in Gibson v. Berryhill (1973) _____U.S._____, 41 LW 4576, 4579, that:

> "As we expressly stated in Mitchum, nothing in that decision purported to call into question the established principles of equity, comity and federalism which must, under appropriate circumstances, restrain a federal court from issuing such injunctions. Id., at 243. These principles have been emphasized by this Court many times in the past, albeit under a variety of different rubrics. . . . . Secondly, there is the basic principle of federalism, restated as recently as 1971 in Younger v. Harris, 401 U.S. 37 (1971), that a federal court may not enjoin a pending state criminal proceeding in the absence of special circumstances suggesting bad faith, harrassment or irreparable injury that is both serious and immediate."

This Court in Younger v. Harris, 401 U.S. at 44, 27 L.Ed.2d at 675, 91 S.Ct. 746, said that a vital consideration for restraining courts of

equity from interfering with criminal prosecutions is "the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and continuance of the belief that the National Government will fare best if the states and their institutions are left free to perform their separate functions in their separate ways."

However, what is involved in the instant case is not an action which merely seeks injunctive relief to enjoin state proceedings. Rather, it is an action which would, if successful, result in injunctive relief entailing provisions for supervision and review of discretionary acts of state court judges and prosecuting attorneys which would generate undue pressures upon such officers to institute criminal prosecutions, when otherwise such prosecutions would not have been instituted, in order to avoid complaints that state laws are being unequally and unlawfully enforced. Such federal judicial interference with the administration of state criminal justice would, it seems to us, be of far greater magnitude and intensity than that which would be entailed if only preventive injunctive relief were granted.

II.

THE DOCTRINE OF THE COURT BELOW RESPECTING EQUITABLE RELIEF SUBVERTS THE PURPOSES OF THE IMMUNITY OF STATE JUDGES OR PROSECUTING ATTORNEYS UNDER 42 USC § 1983

Again, while not questioning the availability of equitable relief against state judges or prosecuting attorneys as they have been generally provided for in the reported cases, we are nevertheless of the opinion that the doctrine set forth by the court below expands the scope of equitable relief as to such state officials in violation of the principles supporting the immunity of state judges or prosecuting attorneys under § 1983 against suits. Our contention is based upon the following argument.

It is generally maintained that prosecuting attorneys should have the same immunity as is afforded judges in civil rights actions under 42 USC § 1983, although such immunity is not without limitation. In addition to the Seventh Circuit, as evidenced by its opinion in the instant case, see also: Bauers v. Heisel (3d Cir. 1966) 361 F.2d 581, 589-591; Turack v. Guido (3d Cir. 1972) 464 F.2d 535, 536; McCray v. State of Maryland (4th Cir. 1972) 456 F.2d 1, 2-3; Madison v. Gerstein (5th Cir. 1971) 440 F.2d 338, 340-341; Kenney v. Fox (6th Cir. 1956) 288 F.2d 228, 290; Puett v.

City of Detroit, Department of Police (6th Cir. 1963) 323 F.2d 591, 593; Hilliard v. Williams (6th Cir. 1972) 465 F.2d 1212; Robichaud v. Ronan (9th Cir. 1965) 351 F.2d 533, 535-536; Marlowe v. Coakley (9th Cir. 1968) 404 F.2d 70; Kostal v. Stoner (10th Cir. 1961) 292 F.2d 492, 493-494. Such prosecutorial immunity is not generally understood to encompass acts clearly outside a prosecutor's jurisdiction; that is, a prosecuting attorney who acts outside the scope of his jurisdiction without authorization of law cannot shelter himself by the plea that he is acting under color of office. It is well said that "[t]he immunity of 'quasi-judicial' officers such as prosecuting attorneys . . . derives, not from their formal association with the judicial process, but from the fact they exercise a discretion similar to that exercised by judges [and that] [l]ike judges, they require the insulation of absolute immunity to assure the courageous exercise of their discretionary duties." (McCray v. State of Maryland, supra, 456 F.2d at 3.) It should be noted that "[t]he key to the immunity previously held tc be protective to the prosecuting attorney is that the acts, alleged to have been wrongful, were committed by their officer in the performance of an integral part of the judicial process." (Robichaud v. Ronan, supra, 351 F.2d at 536.) At least in damage suits, a prosecutor can have no vicarious liability for the acts of his assistant against which

the assistant is immunized. (Madison v. Gerstein, supra, 440 F.2d at 340.)

The almost uniform stand taken by the courts of appeal, and we omit citations to decisions by other courts, is a sufficient reason, considered in the light of the opinions by this Court in Tenney v. Brandhove (1951) 341 U.S. 367, 95 L.Ed. 1019, 71 S.Ct. 783 and Pierson v. Ray (1967) 386 U.S. 547, 18 L.Ed.2d 288, 87 S.Ct. 1213, for the generally approved doctrine that immunity for prosecutors is not abolished by 42 USC § 1983.

Since it seems warranted for us to conclude that this Court would hold that the common-law immunity of prosecutors applies to actions brought under 42 USC § 1983 (or related statutes), the question arises to what extent does the doctrine of immunity for judges or quasi-judicial officers (particularly prosecuting attorneys) apply to injunctive relief.

It has been generally held, declared by dictum, or otherwise indicated that under 42 USC § 1983 (or other similar civil rights statutes), the immunity of state judges or state officers performing quasi-judicial functions (such as prosecuting attorneys) pertains to damage suits but does not preclude declaratory or injunctive relief if prayed for. See, e.g.: Silver v. Dickson (9th Cir. 1968) 403 F.2d 642, 643; Jacobson v. Schaefer (7th Cir.

1971); 441 F.2d 127, 130; United States v. McLeod (5th Cir. 1967) 385 F.2d 734, 738 n. 3; United States v. Clark (S.D.Ala. 1965) 249 F.Supp. 720, 727; Stambler v. Dillon (S.D.N.Y. 1968) 288 F. Supp. 646, 649; Rouselle v. Perez (E.D.La. 1968) 293 F.Supp. 298, 299; Law Students Civil Rights Research Council, Inc. v. Wadmond (S.D.N.Y. 1969) 299 F.Supp. 117, 123-124, aff'd, 401 U.S. 154, 27 L.Ed.2d 749, 91 S.Ct. 720; Bramlett v. Peterson (M.D. Fla. 1969) 307 F.Supp. 1311, 1321-1322; Rakes v. Coleman (E.D.Va. 1970) 318 F.Supp. 181, 192; Palermo v. Rockefeller (S.D.N.Y. 1971) 323 F.Supp. 478, 482; Haley v. Troy (D.Mass. 1972) 338 F.Supp. 794, 800; Mills v. Larson (W.D.Pa. 1972) 56 F.R.D. 63, 67-68, and, of course, the instant case.[8] Of course, as the majority opinion recognizes, the comprehensive nature of the equitable relief which it contemplates compels the conclusion that "this appears to be a case of first impression as to the type of relief approved, . . ." (468 F.2d at 414.) This case does not involve injunctive relief pertaining to civil actions, or which prohibits pending or

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8. Although the court below noted Peckham v. Scanlon (7th Cir. 1957) 241 F.2d 761 in its opinion in the instant case (468 F.2d at 406), it appears that it did not notice that it sub silencio overruled Scanlon because the plaintiff therein prayed for both damages and equitable relief (241 F.2d at 762-763).

threatened criminal prosecutions, or the enforcement of an unconstitutional law, or requiring the performance of ministerial acts. Rather, as Judge Dillin in his dissenting opinion observed, "[t]he majority holds, for the first time, that a federal district court has the power to supervise and to regulate by mandatory injunction the discretion which state court judges and state's attorneys may exercise within the limits of the powers vested in them by law" and that "in the cases cited by the majority . . . the equitable relief granted has invariably been in the form of a prohibitory injunction, confining such officials to the limits of their legal authority." (468 F.2d at 415; footnote omitted.)

Bearing in mind that we are thus concerned with the issue of availability of injunctive relief which includes provision for the comprehensive supervisory review of discretionary acts by state judges and prosecutors in criminal prosecutions, it behooves us to see why this Court in Tenney and Pierson held respectively that the common-law immunity of legislators for acts within the legislative role and that the immunity of judges for acts within the judicial role were not abolished by § 1983. In Tenney the Court explained:

> "The claim of an unworthy purpose does not destroy the privilege. Legislators

are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives." (341 U.S. at 377, 95 L.Ed. at 1027.)

In Pierson, the Court, in explaining its holding that the common-law doctrine of judicial immunity applies to damage suits under § 1983, said:

"Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine, in Bradley v. Fisher, 13 Wall 335, 20 L ed 646 (1872). This immunity applies even when the judge is accused of acting maliciously and corruptly, and it 'is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest

it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.' (Scott v Stansfield, LR 3 Ex 220, 223 (1868) quoted in Bradley v Fisher, supra, 349; note, at 350, 20 L ed at 650.) It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation." (386 U.S. at 554, 18 L.Ed.2d at 294-295.)

It is noteworthy that, although Mr. Justice Douglas dissented from that holding, he acknowledged the importance of exempting judges from liability for the consequences of their honest mistakes and that the judicial function involves an informed exercise of judgment. (386 U.S. 558, at 566, 18 L.Ed.2d 297, at 301.)

When one considers the reasons why there should be immunity from damage suits for state judges and prosecuting attorneys, the conclusion is compelled that the reasons justify the applicability of the immunity to such injunctive

relief which would accomplish the same results as the absence of the immunity from damage suits. Judge Dillin clearly saw the necessity of this conclusion when he maintained in his dissenting opinion in the instant case that

> "the reason for the rule against damage actions applies with equal force to mandatory injunctions which seek to regulate the exercise of discretion of judicial and quasi-judicial officers. It would be cold comfort for such an official to be told by this Court; 'Be of good cheer! We will protect your pocketbook, even as we send you to jail.'" (468 F.2d at 419; footnote omitted.)

But it is not, of course, merely the threat of jail that would undermine the rationale for judicial or quasi-judicial immunity as the explanations by this Court in Tenney and Pierson make clear. It is also the apprehension of a comprehensive inquiry by the federal judiciary of discretionary acts of state judicial or quasi-judicial officers and the inconveniences and distractions incident thereto which would unduly inhibit such officers in the exercise of their powers. Whatever supposed gain for civil rights, the present "ecological" equilibrium would be radically upset were it now deemed that the immunity doctrine does not encompass immunity

from mandatory injunctions which entail the supervision and review of discretionary judicial and quasi-judicial acts.

Clearly, the doctrine propounded by Judge Dillin is consistent with those holdings which have permitted equitable relief against judges and prosecutors because the federal courts did not undertake a supervisory direction of the administration of state criminal justice with a provision for review of discretionary acts, including review of decisions not to prosecute. However, the doctrine announced by the court below would be inconsistent with the contrary philosophy held by this Court as evidenced, for example, in Ker v. California (1963) 374 U.S. 23, 33, 10 L.Ed.2d 726, 738, 83 S.Ct. 1623, where the Court declared that,

> "although the standard of reasonableness is the same under the Fourth and Fourteenth Amendments, the demands of our federal system compel us to distinguish between evidence held inadmissible because of our supervisory powers over federal courts and that held inadmissible because prohibited by the United States Constitution."

The overall supervisory review, albeit not "constant, day-to-day supervision," contemplated by the court below if actually undertaken would constitute "direct intrusion in state processes [which] does not comport with proper federal-

state relationships," to use the words of this Court in Cleary v. Bolger (1963) 371 U.S. 392, 401, 9 L.Ed.2d 390, 397, 83 S.Ct. 385. Or, to borrow words from Stefanelli v. Minard (1951) 342 U.S. 117, 120, 96 L.Ed. 138, 142, 72 S.Ct. 118:

> "For even if the power to grant the relief here sought may fairly and constitutionally be derived from the generality of language of the Civil Rights Act, to sustain the claim would disregard the power of courts of equity to exercise discretion when, in a matter of equity jurisdiction, the balance is against the wisdom of using their power. Here the considerations governing that discretion touch perhaps the most sensitive source of friction between States and Nation, namely, the active intrusion of the federal courts in the administration of the criminal law solely within the power of the States."

The very fact that the doctrine announced by the court below is novel justifies the inference that "the provisions of [42 USC § 1983] do not operate to work a wholesale dislocation of the historic relationship between the state and the federal courts in the administration of criminal justice." (Cf. Greenwood v. Peacock (1966) 384 U.S. 808, 831, 16 L.Ed.2d

944, 959, 86 S.Ct. 1800.)

III.

THE SUPERVISION OF STATE COURT JUDGES OR PROSECUTING ATTORNEYS CONTEMPLATED BY THE COURT BELOW IS SINGULARLY INAPPROPRIATE AS A JUDICIAL FUNCTION

The discretion of the Attorney General of the United States in choosing whether to prosecute or not to prosecute, or to abandon a prosecution already started, is absolute. Courts are not free to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions. See, e.g., Smith v. United States (5th Cir. 1967) 375 F.2d 243, 246-247; United States v. Kysar (10th Cir. 1972) 459 F.2d 422, 424; Spillman v. United States (9th Cir., 1969) 413 F.2d 527, 530. Although this all follows as an incident to the constitutional separation of powers, as Chief Justice (then Circuit Judge) Burger observed in Newman v. United States (D.C. Cir. 1967) 382 F.2d 479, 480:

> "Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought."

The discretion of the prosecuting attorney for the United States to be free from judicial supervision of the discretionary control of criminal prosecutions, including attempts to compel a prosecuting attorney to initiate proceedings, presupposes that the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. As Chief Justice Burger commented:

> "To say that the United States Attorney must literally treat every offense and every offender alike is to delegate him an impossible task; of course this concept would negate discretion. Myriad factors can enter into the prosecutor's decision. Two persons may have committed what is precisely the same legal offense but the prosecutor is not compelled by law, duty or tradition to treat them the same as to charges. On the contrary, he is expected to exercise discretion and common sense to the end that if, for example, one is a young first offender and the other older, with a criminal record, or one played a lesser and the other a dominant role, one the instigator and the other a follower, the prosecutor can and should take such factors into account; no court has any jurisdiction to inquire into

or review his decision.

"It is assumed that the United States Attorney will perform his duties and exercise his powers consistent with his oaths; and while this discretion is subject to abuse or misuse just as is judicial discretion, deviations from his duty as an agent of the Executive are to be dealt with by his superiors." (382 F.2d at 481-482; footnotes omitted.)

It must be remembered, as was noted in United States v. Brokaw (S.D.Ill.1945) 60 F. Supp. 100, 101:

"That the United States District Attorney in his capacity as the public prosecutor in his district is clothed with the power and charged with the duties of the Attorney General in England under the common law is generally recognized and supported by the Federal Courts. [Citations omitted.] In this connection the federal prosecutor acts in an administrative capacity. He is the representative of the public in whom is lodged a discretion to be exercised for the general public welfare, a discretion which is not to be controlled by the courts, or by an interested individual, or by a group of interested individuals who seek redress for wrongs committed

against them by use of the criminal process."

If the discretionary liberty of prosecuting attorneys from judicial interference with or review of discretion is grounded in the common law (see Ganger v. Peyton (4th Cir. 1967) 379 F.2d 709, 713) and if "[f]ew subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought" (see Newman v. United States, supra, 382 F.2d at 480), then there is all the more reason to conclude that 42 USC § 1983 should not be used to permit federal courts to systematically and comprehensively supervise state court judges and prosecutors in the exercise of their discretion merely as a prophylactic measure to prevent racial or ethnic discrimination.

The separation of executive and judicial functions is grounded upon prudential considerations. Thus, Coolidge v. New Hampshire (1971) 403 U.S. 443, 449-453, 29 L.Ed.2d 564, 572-575, 91 S.Ct. 2022, held that search warrants could not be issued by the state attorney general, acting as a justice of the peace, under the Fourth Amendment, because such an official was not a neutral and detached

magistrate. But it is the very confusion of judicial and executive roles which compelled the holding for as this Court explained:

> "Without disrespect to the state law enforcement agent here involved, the whole point of the basic rule so well expressed by Mr. Justice Jackson is that prosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigations - the 'competitive enterprise' that must rightly engage their single-minded attention." (403 U.S. at 450, 29 L.Ed.2d at 573. Footnote omitted.)

Cf. Shadwick v. City of Tampa (1972) 407 U.S. 345, 32 L.Ed.2d 783, 92 S.Ct.2119. Thus, we submit that, quite apart from federal-state relations, the exercise by a federal court judge of executive powers, such as is involved in supervising and reviewing decisions not to institute or further prosecute criminal charges, is a confounding of roles not at all contemplated by those who framed and adopted the Constitution. Moreover, even if, at the outset, an adoption of the executive power by the federal courts is limited to the supervision of state officers, the exercise of such executive power by federal court judges may well give rise to the fear that "[w]ere it [the power of judging] joined to the executive power, the judge might behave with

all the violence of an oppressor." Montesquieu, SPIRIT OF LAWS, quoted in THE FEDERALIST No. 47 (ed. by Jacob E. Cooke, Meridian Books - 1961) at 326. Our conclusion is that the exercise of the executive power which is implicit in the equitable relief sanctioned by the court below is so incompatible with the functions of the federal judiciary that this Court should disapprove such use as a type of the equitable relief permitted by 42 USC § 1983.

IV

ASSUMING THAT EQUITABLE RELIEF AUTHORIZED BY 42 USC § 1983 ENCOMPASSES THE TYPE OF MANDATORY INJUNCTION COMTEMPLATED BY THE COURT BELOW, IT SHOULD BE LIMITED TO THOSE OFFICIALS WHO HAVE INTENTIONALLY AND KNOWINGLY FAILED TO ENFORCE CRIMINAL LAWS BASED UPON UNJUSTIFIABLE CLASSIFICATION OF VICTIMS

Even if novel injunctive relief as contemplated by the court below were deemed appropriate, contrary to our contentions, we urge that such relief should be limited to those state officials who have intentionally and knowingly failed to enforce the criminal laws based upon some unjustifiable classification of victims, such as race.[9] Without

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9. Additionally, we respectfully suggest that the complaint should also allege sufficient

(continued on page 32.)

such a limitation, the federal courts would have the authority to extend their supervision of the administration of state criminal justice to those officials who are the colleagues or successors in office of those who are individually culpable for unequal and unlawful enforcement of the laws.

In the instant case, petitioner W.C. Spomer has been automatically substituted as a party to the extent the cause affects the State's Attorney of Alexander County because '[o]ne of the original parties to this action was Peyton Berbling who was sued individually and as State's Attorney of Alexander County, Illinois [but] [o]n December 4, 1972, Peyton Berbling was succeeded as State's Attorney by W. C. Spomer." (Petition by W. C. Spomer at p. 1.) There are no allegations in the amended complaint to show that there is reason to believe that petitioner W. C. Spomer

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facts which would justify the supervision and review of discretionary acts of judicial or quasi-judicial officers if such relief is requested by the plaintiff(s). "No latitude of intention should be indulged in a case like this. There should be certainty to every intent . . . . This is a matter of proof; and no fact should be omitted to make it out completely, when the power of a Federal court is invoked to interfere with the course of criminal justice of a state." (Cf. Ah Sin v. Wittman (1905) 198 U.S. 500, 507-508, 49 L.Ed. 1142, 1145-1146, 25 S.Ct. 756.)

will discriminatorily enforce the laws as allegedly did his predecessor. (Compare: Two Guys from Harrison-Allentown v. McGinley (1961) 366 U.S. 582, 588-589, 6 L.Ed.2d 551, 556, 81 S.Ct. 1135.) We contend that those same considerations of federalism, comity, and equity, which have been recognized in Younger v. Harris and its companion cases[10/] and the prudential considerations underlying the separation of powers, should at least restrain federal courts from fashioning equitable relief which would control discretionary acts of state judges or prosecuting attorneys pursuant to claims for equitable relief under 42 USC § 1983 as to such officials who have not intentionally and knowingly failed to enforce the law based upon an unjustifiable classification, such as race, in violation of the equal protection clause.

With respect to the colleagues of a state official, the case of Handy Cafe v. Justices of the Superior Court (1st Cir. 1957) 248 F.2d 485, is pertinent. In Handy Cafe, a civil rights action under 42 USC

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10. Samuels v. Mackell, 401 U.S. 66, 27 L.Ed.2d 688, 91 S.Ct. 764; Boyle v. Landry, 401 U.S. 77, 27 L.Ed.2d 696, 91 S.Ct. 758; Perez v. Ledesma, 401 U.S. 82, 27 L.Ed.2d 701, 91 S.Ct. 674; Dyson v. Stein, 401 U.S. 200, 27 L.Ed.2d 781, 91 S.Ct. 769; Byrne v. Karalexis, 401 U.S. 216, 27 L.Ed.2d 792, 91 S.Ct. 777.

1983 was filed against "the members of the Superior Court and Supreme Judicial Court of the Commonwealth of Massachusetts" for various acts and omissions. Equitable, and other relief, was prayed for. The Court of Appeals for the First Circuit affirmed the judgment of the district court dismissing the complaint and in so doing explained, inter alia:

> In addition to the foregoing, we are bound to observe that we know of no authority to the effect that 'the members of the Superior Court and Supreme Judicial Court of the Commonwealth of Massachusetts' constitute suable legal entities. Action under the Civil Rights Act must be against the individual persons or officials who, under color of their respective state offices, subject a person to denial of federal constitutional rights. There are over thirty judges of the Massachusetts Superior Court throughout the Commonwealth and seven justices of the Supreme Judicial Court. Obviously not all of these persons could have been concerned with the various state court proceedings herein complained of. It does not appear against which individual judgments for damages and enforcement orders are sought to be issued." (248 F.2d at 487.)

Our position that equitable relief should

not be granted under 42 USC § 1983 to those who supervise state judges or prosecutors in the exercise of their discretionary judicial or quasi-judicial acts and who have not personally violated federal constitutional or civil rights is supported by the doctrine, held by some courts, that a state or any state agency or subdivision, which is but an arm of the state government - at least, when acting in a sovereign, as distinguished from a proprietary capacity - is not liable as a "person" for the purpose of 42 USC § 1983. (See e.g., Meyer v. State of New Jersey (3d Cir. 1972) 460 F.2d 1252; United States ex rel. Gittlemacker v. County of Philadelphia (3d Cir. 1969) 413 F.2d 84, 86; Hewitt v. City of Jacksonville (5th Cir. 1951) 188 F.2d 423, 424; Collins v. State of Florida (5th Cir. 1970) 432 F.2d 60; Deane Hill Country Club, Inc. v. City of Knoxville (6th Cir. 1967) 379 F.2d 321, 324; United States ex rel. Lee v. People of the State of Illinois (7th Cir. 1965) 343 F.2d 120; Williford v. People of California (9th Cir. 1965) 352 F.2d 474; Loux v. Rhay (9th Cir. 1967) 375 F.2d 55, 58.) Some courts which hold to this doctrine also maintain that the rule of non-liability of a body politic under § 1983 also applies to suits for injunctive relief.[11]

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11. See Lehman v. City of Pittsburgh (3d Cir. 1973) 474 F.2d 21, 22; Educational Equality League v. Tate (3d Cir. 1973) 472 F.2d

In Deane Hill Country Club, Inc. v. City of Knoxville (6th Cir. 1967) 379 F.2d 321, the implications of this two-fold doctrine are clearly understood. In that case the defendants were the City of Knoxville and George F. McCanless, Attorney General of Tennessee. The Court of Appeals for the Sixth Circuit held that the statute was inapplicable, and declared that this court in Monroe v. Pape, supra, 365 U.S. at 191 n. 50, "seemingly settled the question of whether equitable relief against a municipality could be obtained under Section 1983."[12]

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612 n. 1; Diamond v. Pitchess (9th Cir. 1969) 411 F.2d 565, 567; Agnew v. City of Compton (9th Cir. 1956) 239 F.2d 226, 230; Deane Hill Country Club, Inc. v. City of Knoxville (6th Cir. 1967) 379 F.2d 321, 324; Cf. Handy Cafe v. Justices of the Superior Court (1st Cir. 1957) 248 F.2d 485, 487; Cobb v. City of Malden (1st Cir. 1953) 202 F.2d 701.

Among those courts which take the contrary view, see, e.g.: Harkless v. Sweeny Independent School District (5th Cir. 1970) 427 F.2d 319, 321-323; Garren v. City of Winston-Salem, North Carolina (4th Cir. 1972) 463 F.2d 54, 55; Adams v. City of Park Ridge (7th Cir. 1961) 293 F.2d 585; Schnell v. City of Chicago (7th Cir. 1969) 407 F.2d 1084.

12. Just recently this Court has held in Moor v. County of Alameda (1973) ___U.S.___, 41 L.W. 4627, that a federal cause of action does not lie against a municipality under 42 USC §§ 1983 and 1988 for the actions of its officers which violate an individual's federal civil rights where the municipality is subject to such liability under state law. The Court expressly noted that "the question . . .

(continued on page 37)

(379 F.2d at 324.) The court then proceeded to declare:

> "Nor can this action be maintained against defendant McCanless, Attorney General of the State of Tennessee, under

(continued from page 36)

whether a municipality may be sued for equitable relief under § 1983 - simply is not presented here." (41 L.W. at 4628 n. 2.) Justice Douglas in his dissenting opinion remarked, "There may be overtones in Monroe v. Pape, that even suits in equity are barred [but] [y]et we never have so held." (41 L.W. at 4636.)

For an able exposition of the reasons why the doctrine of equitable relief should not be obtained under § 1983 against a state, or its agency or subdivision, or an officer in his official or representative capacity (regardless of his personal involvement in causing any deprivation of rights), see Harkless v. Sweeny Independent School District (S.D.Tex. 1969) 300 F.Supp. 794, 800-807 (albeit reversed by the Court of Appeals for the Fifth Circuit in 427 F.2d 319). Also compare § 1983 with 42 USC § 1971 which provides concerning a suit by the United States Attorney General for preventive relief that "(c) . . . . [w]henever, in a proceeding instituted under this subsection any official of a State or subdivision thereof is alleged to have committed any act or practice constituting a deprivation of any right or privilege secured by subsection (a) of this section, the act or practice shall also be deemed that of the State and the State may be joined as a party defendant and, if, prior to the institution of such proceeding, such official has resigned or has been relieved of his office and no successor has assumed such office, the proceeding may be instituted against the State."

> section 1983. Clearly the State of Tennessee is not liable as a 'person' within the meaning of this section ([citation omitted]), and because section 1983 imposes liability only upon a person who 'subjects or causes to be subjected' any other person to the deprivation of rights secured by the Constitution, it is, briefly stated, the individual's conduct which forms the basis of liability. 'The Act prescribes two elements * * * (1) the conduct complained of must have been done by some person acting under color of law; and (2) such conduct must have subjected the complainant to the deprivation of rights. * * *' Bastista v. Weir, 340 F.2d 74, 79 (3d Cir. 1965) (Emphasis added) The complaint sets forth no conduct by defendant McCanless which could possibly be construed as depriving plaintiff of any rights; it merely appears that McCanless was made a party defendant because a statute of Tennessee was claimed to be unconstitutional." (379 F.2d at 324.)

Even were this Court to expressly determine that equitable relief can be obtained in a civil rights action under § 1983 against a state, or an agency or subdivision thereof, or against a state officer sued in his representative rather than individual, capacity, we respectfully submit that the argument set forth in

This portion of our brief has value with respect to discretionary judicial or quasi-judicial acts of judges or prosecuting attorneys relating to the administration of criminal justice.

CONCLUSION

For the reasons set forth above, it is respectfully urged that this Court disapprove the novel doctrine announced by the court below, reverse its judgment, and affirm the judgment of the district court dismissing respondents' amended complaint.

Respectfully submitted,

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DISTRIBUTION OF SENTENCE LEVELS BY TYPE OF ATTORNEY[a]

(In percent)

Type of Attorney	Sentence Level		
	Felony	Misdemeanor	§17 PC
Public Defender	44.0	52.2	3.8
Court-appointed attorney	49.4	47.2	3.4
Private attorney	50.3	45.9	3.8

[a]Sample of 2617 theft defendants in 1970 countywide felony defendant file.

APPENDIX A

RELATIONSHIP BETWEEN ETHNIC GROUP AND PATTERN OF TREATMENT

Within our sample, 48 percent of the defendants were Anglo-American, 40 percent black, and 12 percent Mexican-American. The blacks tended to have more extensive prior criminal records than the Anglo-Americans, and the Mexican-Americans more extensive than the blacks. A slightly greater percentage of the black and Mexican-American defendants were also minors as compared to Anglo-Americans; 11.5 percent of Anglo-Americans were minors whereas 14.0 percent of blacks and 14.9 percent of Mexican-Americans were minors.

Table 37 shows the acquittal rate of defendants in the three ethnic groups. The black acquittal rate is considerably higher than that of the Anglo-Americans and, to a somewhat lesser extent, higher than that of the Mexican-Americans. Table 38 shows that both blacks and Mexican-Americans tend to be convicted of the original felony charged about 9 percent less frequently than Anglo-Americans. Table 39 shows that convicted blacks receive felony sentences roughly 5 percent less frequently than Anglo-Americans, and Mexican-Americans roughly 4 percent less.

Table 37

ACQUITTAL RATE BY ETHNIC GROUP[a]

(In percent)

Race	Acquitted	Convicted
Anglo-American	12.7	87.3
Black	17.3	82.7
Mexican-American	13.5	86.5

[a]Sample of 2617 theft defendants in

Table 38

DISTRIBUTION OF CONVICTION LEVELS BY ETHNIC GROUP[a]

(In percent)

Race	Conviction Level		
	Felony Charged	Lesser Felony	Misdemeanor
Anglo-American	67.0	24.4	8.7
Black	58.5	31.3	10.2
Mexican-American	58.1	31.3	10.6

[a]Sample of 2617 theft defendants in 1970 countywide felony defendant file.

Table 39

DISTRIBUTION OF SENTENCE LEVELS BY ETHNIC GROUP[a]

(In percent)

Race	Sentence Level		
	Felony	Misdemeanor	§17 PC
Anglo-American	48.6	47.7	3.7
Black	43.9	52.3	3.8
Mexican-American	44.7	51.3	4.1

[a]Sample of 2617 theft defendants in 1970 countywide felony defendant file.

Ultimately, efforts to explain these differences can be classified into two hypotheses: either (1) these data demonstrate that the judicial system applies a double standard to minority groups, or (2) more innocent minority group members are being arrested and charged with felonies than innocent Anglo-Americans. Arguments for the first hypothesis are difficult to test with these data, since we have no way of measuring rates of over-arrest except by resorting to the acquittal rates that were the source of our hypotheses. In considering the possibility of over-arrest, however, one must remember that these data include only cases in which the District Attorney's screening has taken place and a Deputy District Attorney has decided a case is worthy of prosecution, and further, a Municipal Court judge has held the defendant to answer after a preliminary hearing to assess the merits of the case. Such screening does not exclude the possibility of over-prosecution of certain groups; in fact, if the over-arrest phenomenon is pronounced enough, we could simply be observing an inadequate correction mechanism that could be rejecting and dismiss-

ing more cases for the over-arrested groups than for the general population, but not frequently enough to compensate fully.

Table 40 shows that most of the differences between the black acquittal rate and that of other ethnic groups is concentrated in three Branches: Los Angeles (Central), Santa Monica, and Pomona. In the remaining five Branches, the differences are small and not statistically significant. Table 40 also shows the ethnic distribution of defendants tried in each of the eight Branches.

We note that there is no similarity between ethnic compositions of the three Branches in which we found acquittal rates related to the defendant's ethnic group. Los Angeles has the county's second largest minority population, Pomona has the second smallest minority population, and Santa Monica is right at the median. Santa Monica is the only Branch in which the Mexican-American acquittal rate is disproportionately high, and it has the county's second smallest Chicano population.

These facts at least suggest that differences in acquittal rates by ethnic group cannot be attributed to differences in either the group of defendants tried in each Branch or, by inference from the ethnic distribution of defendants, the ethnic composition of juries in these Branches. To some extent this tends to operate against the double standard explanation.

These disparities are almost equally pronounced among the Public Defender's clients. The black dismissal rate for Public Defender clients is 17.5 percent higher than we would expect, based on the average dismissal rate for all of the Public Defender's cases. On the basis of present data, we cannot say whether this suggests that blacks are more competently represented at trial by Public Defenders than are Anglo-Americans and Mexican-Americans, or that representation of blacks at the preliminary hearing by the Public Defender's office is inferior. But dismissal rates for blacks represented by court-appointed attorneys or private counsel are not different from those for Anglo-Americans.

Although black dismissal rates (5.7 percent) are slightly higher than those for Anglo-Americans (5.3 percent), the difference is not large enough to account for the

Table 40

BRANCH ACQUITTAL RATES BY ETHNIC GROUP[a]

(In percent)

Race	Los Angeles[b]	Long Beach	Santa Monica[b]	Van Nuys	Torrance	Norwalk	Pomona[b]	Pasadena
Acquittal Rates								
Anglo-American	15.9	10.5	26.2	9.2	13.7	7.1	10.6	17.3
Black	19.9	7.2	12.4	11.8	15.8	8.9	22.8	15.7
Mexican-American	19.6	6.3	25.5	6.8	13.7	6.1	12.5	17.5
Ethnic Distribution of Defendants Tried								
Anglo-American	35.1	52.4	63.2	77.2	34.7	57.1	38.7	52.5
Black	53.2	35.4	30.5	11.2	53.1	14.7	14.9	36.0
Mexican-American	11.7	12.3	6.4	11.6	12.2	28.2	46.3	11.5

[a]Sample of 6,7 theft defendants in 1970 countywide felony defendant file.

[b]Statistically significant differences.

differences in acquittal rate. The most significant cause for the higher black acquittal rate can be found by looking at guilty plea rates. While 62.4 percent of the Anglo-American defendants and 56.7 percent of Mexican-American defendants plead guilty, only 39.9 percent of blacks do so. If we exclude all guilty pleas from the sample and base acquittal rate on this smaller group, we find a *reversal* in the disparities; the black acquittal rate of 28.7 percent is *lower* than either the Anglo-American acquittal rate of 33.7 percent or the Mexican-American rate of 31.2 percent. Of course, the salient question, which remains unanswered, is whether the lower rate of guilty pleas among black defendants reflects a distrust of the judicial system independent of the defendants' guilt, or a greater willingness to fight their cases because of a higher proportion of unwarranted prosecutions. If we believe that trials are accurate measures of true guilt, and if we further believe that no defendant pleads guilty who is not guilty, then in fact, the higher black acquittal rate is attributable to an over-prosecution of blacks. But it can also be argued that there is a positive probability that any prosecution, regardless of its merits, will result in an acquittal if contested; if this argument is true, then the higher black acquittal rate would not necessarily support the over-arrest explanation.

It is also reasonable to ask whether blacks more frequently contest prosecutions because they fare better at trials than Anglo-Americans or Mexican-Americans. An examination of the conviction rates by SOT, court trial, and jury trial shows that this is not the case. Blacks are convicted slightly more often than Anglo-Americans in a contested disposition, but are more likely to have the charge reduced or to receive a misdemeanor sentence.

In summary, there are moderate to small (but statistically significant) disparities in the treatment of defendants by ethnic group in the courts. The apparent greater frequency of acquittals for blacks over either Anglo-Americans or Mexican-Americans is probably attributable to a lesser likelihood that black defendants will plead guilty; 39.9 percent of blacks but 62.4 percent of Anglo-American defendants plead guilty. Both blacks and Mexican-Americans tend to be convicted of the original felony charged (robbery or burglary) about 9 percent less frequently than Anglo-Americans. Convicted blacks receive felony sentences roughly 5 percent less frequently than Anglo-Americans, and Mexican-Americans roughly 4 percent less. In contested dispositions, blacks are convicted slightly more often than Anglo-Americans, but are more likely to be convicted of a lesser charge and to receive a misdemeanor sentence. The most provocative question left unresolved is whether these disparities can be attributed to over-prosecution. The question of over-arrest is simply not amenable to analysis solely by use of the data at our disposal.